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LAW OFFICES  
J. RICHARD ARAMBURU

The Honorable Dean S. Lum  
Trial Date: February 11, 2008

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

PHOENIX DEVELOPMENT, INC., a Washington )  
Corporation, and G&S SUNDQUIST THIRD )  
FAMILY LIMITED PARTNERSHIP, a )  
Washington limited partnership, )

Petitioners/Plaintiffs,

v.

CITY OF WOODINVILLE, a Washington )  
Municipal Corporation, and CONCERNED )  
NEIGHBORS OF WELLINGTON, a Washington )  
Nonprofit Corporation, )

Respondents/Defendants.

No. 07-2-29402-3 SEA

RESPONDENT CITY OF WOODINVILLE'S  
MOTION TO STRIKE

**I. RELIEF REQUESTED**

Respondent City of Woodinville respectfully moves this court for an order striking various statements contained within the Opening Brief submitted by Petitioners Phoenix Development, Inc. and G&S Sundquist Third Family Limited Partnership (collectively, "Phoenix") in the above-captioned Land Use Petition Act appeal. The statements in question contain factual information beyond the scope of the certified administrative record that has been submitted for this case. Consideration of this information would violate the Land Use Petition Act, under which the superior court's review must be based exclusively upon the administrative

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1 record underlying the challenged land use decisions. The court should accordingly disregard and  
2 formally strike these statements.

## 3 II. STATEMENT OF FACTS

4 The instant case involves Phoenix's challenge to two land use decisions issued by the  
5 Woodinville City Council which denied the rezone requests and preliminary plat applications for  
6 the Wood Trails and Montevallo development projects, respectively. *See Land Use Petition at 3-*  
7 *14.* The Wood Trails and Montevallo proposals were considered simultaneously in a combined  
8 open-record public hearing before the City's hearing examiner and during a subsequent closed-  
9 record review proceeding before the Woodinville City Council. A combined administrative  
10 record was compiled for both projects. *See the Opening Brief and Response Briefs filed in the*  
11 *LUPA proceeding.*

12 Phoenix challenged the Woodinville City Council's decisions denying the Wood Trails  
13 and Montevallo proposals by filing a Land Use Petition Act (LUPA) appeal under Chapter  
14 36.70C RCW. Following the filing of the appeal, an index listing the administrative records  
15 exhibits was filed with the court.

16 On January 7, 2008, Phoenix filed and served its Prehearing Brief. The brief repeatedly  
17 alludes to and relies upon factual information not contained within the administrative record.  
18 Specifically, the following statements in Phoenix's brief refer to facts that are beyond the record:

- 19 • The lengthy discussion of Joseph Tovar's study entitled  
20 "Appropriate Urban Densities in the Central Puget Sound Region:  
21 Local Plans, regional Visions, and the Growth Management Act"  
22 (Puget Sound Regional Council, 2005). *See Brief of Petitioner at*  
23 *8-10 and Addendum A.*
- 24 • The March 13, 2006 staff report excerpt regarding the upzoning  
25 process for the City's R-1 zoning district. *See Brief of Petitioner at*  
26 *11 and Addendum C.*

- The discussion concerning the lack of any recent amendments to the Woodinville zoning code in response to the City's Sustainable Development Study, as well as the Woodinville City Council's intent to consider such amendments in 2008. *See Brief of Petitioner at 24.*
- The transcription of statements concerning urban densities allegedly made by Woodinville City Council Member Don Brocha at a May 1, 2006 City Council meeting. *See Brief of Petitioner at 27 and Addendum H.*

Phoenix has not moved this court for an order allowing discovery or supplementation of the administrative record. *See court records of the proceeding.*

### III. STATEMENT OF ISSUES

The City's motion presents the following issues for the Superior Court's determination:

1. Do the factual references listed in Section II of this motion and set forth in Phoenix's Prehearing Brief contain information that is beyond the certified administrative record for this appeal? [Yes]
2. Should the court strike and decline to consider these factual references as inappropriate "additional evidence" pursuant to RCW 36.70C.120? [Yes]

### IV. EVIDENCE RELIED UPON

The City relies upon the following evidence for purposes of this motion:

1. The Index listing of the administrative record for the proposed Wood Trails and Montevallo development projects on file with the Superior Court.
2. The Land Use Petition and Complaint for Damages filed by Petitioner Phoenix Development, Inc. on file with the Superior Court.
3. The Prehearing Brief of Petitioner Phoenix Development, Inc. on file with the Superior Court.

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#### IV. ARGUMENT AND LEGAL AUTHORITY

##### A. RCW 36.70C.120 Prohibits the Introduction of New Factual Information.

A fundamental aspect of judicial review under LUPA is that the Superior Court must base its decision exclusively upon the administrative record from the proceedings below:

When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer[.]

RCW 36.70C.120(1).<sup>1</sup> Washington courts have consistently enforced this limitation. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133, 990 P.2d 429 (1999); *Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 841, 974 P.2d 1249 (1999); *East Fork Hills Rural Ass'n v. Clark County*, 92 Wn. App. 838, 842, 965 P.2d 650 (1998).

It is undisputed that the rezone proposals and preliminary plat applications for the Wood Trails and Montevallo projects were quasi-judicial in nature. RCW 36.70C.020(1)(a); *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 178-80 & n.1, 4 P.3d 123 (2000). There is likewise no dispute that the parties enjoyed an opportunity to "make a record on the factual issues" during the lengthy open-record hearings conducted by the City's hearing examiner. RCW 36.70C.120(1). And Phoenix does not contend that the City's decisional framework for the Wood Trails and Montevallo proposals violated its procedural due process rights. Under these circumstances, the mandate of RCW 36.70C.120 is clear: the Superior Court's review of the challenged land use decisions must be "confined to the record".

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<sup>1</sup> The statute contains three limited exceptions to this rule. Supplementation of the record may be authorized on a case-specific basis for purposes of disqualifying a member of the local decision-making body, reintroducing materials that were improperly excluded during the proceedings below, and demonstrating that particular matters were beyond the decision-making body's jurisdiction. *See* RCW 36.70C.120(2). None of these exceptions are relevant to the instant appeal.

1           **B.     The Extra-record Information Contained Within Phoenix's Prehearing Brief**  
2 **Violates RCW 36.70C.120.**

3           In the instant case, Phoenix has larded its Prehearing Brief with numerous factual  
4 references that are outside the administrative record for the Wood Trails and Montevallo  
5 proposals. Phoenix has not formally moved this court for an order allowing supplementation of  
6 the record to this effect, and its untimely attempt to inject additional facts into this LUPA  
7 proceeding should be rejected.

8           **1.     The factual information from the Tovar study should be stricken.**

9           Phoenix cites Joseph Tovar's "Appropriate Urban Densities" study in an attempt to  
10 demonstrate that denial of the Wood Trails and Montevallo rezone proposals was inconsistent  
11 with the "compact urban landscape" Mr. Tovar apparently believes is required under the Growth  
12 Management Act. *See Brief of Petitioner at 8-9.* Included in Phoenix's lengthy discussion of  
13 this topic are several factual assertions regarding the residential density designations of other  
14 municipalities within the Puget Sound region. *See Brief of Petitioner at 9 and Addendum A.*  
15 These factual references are wholly absent from the Wood Trails and Montevallo administrative  
16 record and should be stricken pursuant to RCW 36.70C.120.

17           In its Prehearing Brief, Phoenix asks this court to take judicial notice of the Tovar study  
18 as a "legislative fact". *See Brief of Petitioner at 8.* The court should reject this request.  
19 Legislative facts are "the sort of background information a judge takes into account when  
20 determining the constitutionality or proper interpretation of a statute, extending or restricting the  
21 common law rule, or the like." 5 Karl B. Tegland, Washington Practice, Evidence § 49 (2d ed.  
22 1982). They include "historical facts, commercial practices and social standards". *State v.*  
23 *Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) (citation and internal punctuation omitted).

24           Phoenix argues that the proffered Tovar study will "enable [the court] to interpret the  
25 law". *See Brief of Petitioner at 8.* Critically, however, "the law" relevant to the Wood Trails  
26 and Montevallo development proposals is comprised exclusively of (1) the decisional criteria

1 codified in the Woodinville Municipal Code, and (2) the state law applicable to site-specific  
2 project permits. Growth Management Act principles of the type discussed in the Tovar article  
3 are wholly irrelevant in this context. *See, e.g., Woods v. Kittitas County*, -- P.3d -- , 2007  
4 WL4442396 at 7 (“a site-specific rezone cannot be challenged for compliance with the GMA”).  
5 Mr. Tovar’s purported insight regarding an inapplicable statute clearly would not enable this  
6 court “to interpret the law” governing the subject matter of this appeal. Phoenix’s attempt to  
7 supplement the administrative record on this basis should be denied.

8 **2. The March 13, 2006 staff report excerpt should be stricken.**

9 Phoenix’s excerpt from the March 13, 2006 staff report from City of Woodinville  
10 Community Development Director Ray Sturtz should also be stricken, as it was not included in  
11 the certified administrative record for the Wood Trails and Montevallo proposals. *See Brief of*  
12 *Petitioner at 11 and Addendum C*. Like the Tovar article, Phoenix attempts to characterize the  
13 staff report excerpt as a legislative fact of which the court should take judicial notice. *See Brief*  
14 *of Petitioner at 11*. This argument is without merit.

15 Mr. Sturtz’s staff report was submitted to the Woodinville City Council in conjunction  
16 with the City’s Sustainable Development Study, a comprehensive policy effort to determine the  
17 appropriate regulatory mechanisms for accommodating future growth in the City’s low-density  
18 residential neighborhoods. *See Brief of Petitioner at Addendum C*. The Sturtz report was  
19 drafted several years after the City’s adoption of the Woodinville Municipal Code rezone criteria  
20 at issue in this litigation, and nowhere purports to explain their intended effect or meaning. *Id.*  
21 The report’s policy analysis regarding the City’s potential options in amending its local  
22 development regulations is entirely irrelevant to the Wood Trails and Montevallo proposals,  
23 since — as Phoenix correctly notes — the applications submitted for these projects in 2004  
24 vested them to the local regulations extant at that time. *See Brief of Petitioner at 13, 21*.  
25 Phoenix is unable to demonstrate how the Superior Court’s consideration of this extra-record  
26 information would remotely facilitate its understanding of the legal framework relevant to the

1 present appeal. Because the March 13, 2006 staff report does not relate to the site-specific land  
2 use proposals at issue in this case and clearly is not a "legislative fact", it should be stricken  
3 accordingly.

4 **3. Phoenix's references to the Woodinville City's Council's**  
5 **consideration of zoning code amendments should be stricken.**

6 The reference in Phoenix's Prehearing Brief to the Woodinville City Council's recent and  
7 future consideration of zoning code amendments is likewise outside the scope of the Wood Trails  
8 and Montevallo administrative record. *See Brief of Petitioner at 24.* Phoenix makes no attempt  
9 to characterize these statements as "legislative facts", and there is no legitimate basis for  
10 admitting this inherently factual, extra-record information into the Superior Court's decisional  
11 process. Because consideration of these references would violate RCW 36.70C.120, the court  
12 should disregard and strike them.

13 **4. Council Member Brocha's May 1, 2006 comments should be stricken.**

14 In support of its argument regarding the purported availability of "adequate services" for  
15 the Wood Trails and Montevallo projects, Phoenix offers a lengthy block quotation derived from  
16 the transcribed statements of Woodinville City Council Member Don Brocha. *Brief of Petitioner*  
17 *at 27 and Addendum H.* Council Member Brocha's comments were made during a May 1, 2006  
18 City Council meeting concerning the City's Sustainable Development Study and land use  
19 planning efforts. *See Brief of Petitioner at Addendum H.* Neither the May 1, 2006 City Council  
20 meeting nor Mr. Brocha's statements specifically addressed the Wood Trails and Montevallo  
21 projects or the Woodinville Municipal Code rezone criteria codified at WMC 21.44.070.  
22 Council Member Brocha's comments were not included in the administrative record for the  
23 Wood Trails and Montevallo projects.

24 The Superior Court should strike these statements from the instant case and reject  
25 Phoenix's attempt to admit them as legislative facts. *See Brief of Petitioner at 27.* Council  
26 Member Brocha's statements do not cite or refer to the Woodinville Municipal Code provisions

1 at issue in this LUPA appeal. Instead, these comments specifically address only Growth  
2 Management Act issues and the City's Comprehensive Plan. *See Brief of Petitioner at*  
3 *Addendum H.* Mr. Brocha's statements are facially irrelevant to the site-specific rezoning  
4 decision at issue in the instant case and do not — as a matter of law — constitute "legislative  
5 facts" relevant to this litigation. *See Woods*, 2007 WL4442396 at 7.

6 Even more fundamentally, Council Member Brocha's comments can hardly be construed  
7 as evincing the legislative intent and/or recollection of the Woodinville City Council as a whole.  
8 In this regard, Phoenix "cannot rely upon one council member's statement to show the council's  
9 intent." *Tekoa Construction, Inc. v. City of Seattle*, 56 Wn. App. 28, 35, 781 P.2d 1324 (1989).  
10 It is axiomatic that "[w]hat may have been the intent of an individual legislator may not have  
11 been the intent of the legislative body[.]" *Convention Ctr. Coalition v. City of Seattle*, 107  
12 Wn.2d 370, 375, 730 P.2d 636 (1986). Phoenix's attempt to define the Woodinville City  
13 Council's legislative intent based upon the selectively-quoted statements of an individual  
14 Council Member is without merit and should be rejected by the court.

## 15 V. CONCLUSION

16 By unequivocal statutory mandate, the Superior Court's decision in this Land Use  
17 Petition Act appeal must be based exclusively upon the administrative record of the local  
18 proceedings below. Phoenix's eleventh-hour attempt to circumvent this limitation by injecting  
19 additional information under the thinly-veiled guise of "legislative facts" is unpersuasive and  
20 should be denied. The court is respectfully requested to enter an order striking the factual  
21 statements in question as violative of RCW 36.70C.120.

## 23 VI. PROPOSED ORDER

24 A proposed form of order granting the City's requested relief is included with the  
25 working copy of this Motion provided to the court.

26 DATED this 28th day of January, 2008.



OGDEN MURPHY WALLACE, P.L.L.C.

By

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